

IN THE  
United States Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT.

In the Matter of the Contempt of the  
INDEPENDENT PUBLISHING  
COMPANY, a corporation, and its  
manager and editor, WILL A.  
CAMPBELL,  
*Plaintiffs in Error  
and Respondents.*

BRIEF OF UNITED STATES—DEFENDANT  
IN ERROR.

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Filed

SEP 5 - 1916

F. D. Monckton

Clerk



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This is an appeal wherein the Independent Publishing Company, a corporation, and Will A. Campbell, its manager and editor, have appealed to this Court from a judgment rendered in the District Court of the United States for the District of Montana, adjudging them to be in contempt and fining the defendants in the sum of \$617.95 and the costs of the contempt proceeding.

The information filed in the lower court and the

answer of plaintiffs in error constitute the entire record upon which the lower court acted. Plaintiffs in error having admitted the publication of the article set forth in the information, although denying that any intent to commit a contempt existed, there are just two questions for the consideration of this court. They are:

Was the publication of the article itself a contempt under the circumstances?

Was the court justified in imposing the fine it did?

#### WAS THE PUBLICAITON A CONTEMPT?

Counsel for plaintiffs in error have presented in support of their contentions an able brief that contains a most excellent resume of the origin of contempt and the early law relating thereto. But we contend that in the present case they have gone far afield and by an argumentative construction, of their own, which they place upon the decisions they cite, have entirely lost sight of the vital question here. This question with which we are most concerned is, was the publication *misbehavior so near to the presence of the court as to obstruct the administration of justice?*

We contend that the great weight of authority is that a physical presence before the court is not at all necessary to vest the court with power to punish for a contempt nor is it at all necessary that the newspaper containing the article be circulated or sold in the court room or even in the corridors or

rooms adjacent thereto.

In the case of *United States vs. Carter*, 3 Cranch, C. C. 423, 25. Fed. Cases 15740, it was held that threats made to a witness on the piazza of the court house was a contempt in the presence of the court.

Judge Hammond, in passing upon a contempt, in the case of

*United States vs. Anon*, 21 Fed. 761, 768,

said as to a contempt being committed in the presence of the court:

“The mere place of occurrence may not be an absolute test of that question, and it may depend upon the character of the particular conduct in other respects besides the place where it happens. \* \* \* Wherever the conduct complained of ceases to be general in its effect, and invades the domain of the court, to become specific in its injury, by intimidating, or attempting to intimidate, with threats or otherwise, the court or its officers, the parties or their counsel, the witnesses, jurors, and the like, while in the discharge of their duties as such, if it be constructive because of the place where it happens, because of the direct injury it does in obstructing the workings of the organization for the administration of justice in that particular case, the power to punish it has not yet been taken away by any statute, however broad the terms may apparently be.”

Judge Hawley, in the case of *In re Brule*, 71 Fed. at page 947, 948, discusses, in a contempt case, the meaning of the phrase “or so near thereto as to

obstruct the administration of justice,” and after reviewing the cases, which he cites, says:

“Now, from the reasoning of these cases, it is made perfectly clear that the misbehavior of which Brule is guilty, if it had occurred anywhere within the building where the court is held, would have been ‘clearly a contempt, punishable as provided in section 725 of the Revised Statutes, by fine or imprisonment, at the discretion of the court, and without indictment.’ Why? Because, under such circumstances, it would have been misbehavior of a person in the presence of the court. But the statute says that the misbehavior of a person ‘so near thereto as to obstruct the administration of justice’ may be likewise punished as a contempt of court. If it is a contempt to bribe a witness in front of the courthouse door, is it not a contempt to attempt to do the same thing on the street opposite the court building, or four blocks away? Is not the result the same. Is not the motive of the accused the same? What difference does it make whether the attempt was made on the ground owned by the United States, or at the residence of the witness in the same town, four blocks, or about one-quarter of a mile away, from the court building? In one case the misbehavior would be construed to be in the presence of the court, and in the other ‘so near thereto as to obstruct the administration of justice,’ and the statute, in clear language, is made to apply to both cases.”

A most concise statement of the meaning of the phrase which we are now considering is to be found from this Circuit, in the case of

Kirk vs. United States, 192 Fed. 273,

wherein this court had occasion to pass upon this precise question. In the Kirk case, the alleged contempt was committed by attempting to bribe jurymen at a place distant nine blocks or 2700 feet from the Court House. We refrain from quoting excerpts from the opinion as your Honors are more familiar with it than we are. But suffice it to say that only one difference can be found between the case at bar and the Kirk case, that is, in the Kirk case the contempt consisted of an attempt to influence the verdict of jurors with money and in the case at bar the article published was in itself one that was well calculated to influence the minds of the jurors by presenting to them the sordid facts relating to the unfortunate defendant, Poe's, past life. Of course, the first is the most reprehensible thing that can be done for its effect strikes at the foundation of our judicial system, and while the second because of its nature is not so reprehensible nevertheless is a thing not to be tolerated for it would enable unscrupulous persons to wield a mighty weapon with which to thwart justice. No matter how guilty a man may be, he is always entitled to a fair trial and when any article is published that may tend to prejudice the minds of jurors then hearing the evidence of his guilt the same is an obstruction of justice within the meaning of the statute and within the jurisdiction of the court to punish summarily.

The Kirk case, *supra*, is cited with approval in the case of

United States vs. Toledo Newspaper Co., 220  
Fed. 458,

wherein the court had under consideration an alleged contempt of a newspaper and its editor for the publication of an article relating to a matter then pending in court. This seems to be the only case nearly resembling the case at bar that is reported from a Federal Court. The opinion is too lengthy to permit of sufficient quotations therefrom, hence we content ourselves with quoting from the syllabus:

“The constitutional guaranty of free speech and free press is not infringed by summary process and conviction in contempt, because of publications respecting a pending cause and tending to obstruct the administration of justice therein.”

“The act of March 2, 1831, (Rev. St. Par. 725; Judicial Code, Par. 286, Comp. St. 1913, Par. 1245,) declaratory of the law of contempt, was not intended to, nor does it, exempt publishers and editors from attachment for contempt for publications improperly affecting a pending case.”

“It is provided in section 268, Judicial Code, that this court may punish as contempt of its authority misbehavior so near its presence ‘as to obstruct the administration of justice.’ *Held*, that the criterion whether an alleged misbehavior is within this provision of the act is not the physical or topographical propinquity of the act to the court; but, having reference to all the pertinent circumstances attending its commission, it is the nature of the act as tend-

ing directly to affect the administration of justice.”

“Publications in a newspaper of general circulation in the city wherein the court sits, which publications are of a nature to embarrass the judge of the court in his consideration of a pending cause, or which tend to appeal to prejudice against the court or against a party to the cause respecting a pending case, may be misbehavior so near the presence of the court as to obstruct the administration of justice, wherefore they may subject the publisher or the editor, or both, to summary process in contempt under section 268, Judicial Code.”

“In order to produce a conviction, as contempt of court, for a newspaper publication affecting a pending cause, it is not necessary that the proof should show either that the publication ever came to the attention of the judge of the court, or that it had any influence on the consideration of the cause to which it refers. It is sufficient if, excluding any other reasonable interpretation of the language of the publication, after applying the ordinary rules for construing the English language and considering how it may be reasonably understood by ordinary readers, the state of public feeling on the subject-matter of the publication, and any other relevant matter which may reasonably aid in understanding the necessary effect of such publication respecting the pending cause, it is seen to tend to obstruct the administration of justice therein.”

The opinion rendered by Judge Bourquin in the case at bar is to be found in the transcript herein, pages 17 to 22 both inclusive. This opinion contains the views of the District Court of the United States for the District of Montana, and inasmuch as the

citations therein contained will be read by the Court on this appeal we will not repeat the same here.

As to the meaning of the words “misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice” (Sec. 268 Judicial Code U. S.) see also:

Savin’s Case, 131 U. S. 267, 275.

Coming to the question of the intent which plaintiffs in error claim is lacking in the case at bar. First we respectfully refer to those cases cited by Judge Bourquin in his decision which are to be found on pages 20, 21, 22. They are

Ellis vs. U. S., 206 U. S. 257;

Newspaper Co. vs. Commonwealth, 188 Mass. 449, 74 N. E. 682;

Patterson’s Case, 205 U. S. 462;

Newspaper Co. vs. Commonwealth, 172 Mass. 292, 52 N. E. 445.

In addition to the cases just cited we cite

State vs. Howell, 80 Conn. 668; 13 Ann Cases 501, and footnote on pages 503 and 504, in 13 Ann. Cases,

where in the rule is stated to be that where a newspaper publication makes a direct charge against the court which admits of but one fair and reasonable construction, and requires no innuendo

to apply the meaning to the court, the disavowal of an intent to commit a contempt is not available as a defense, although such disavowal may serve to extenuate the offense.

The contention of plaintiffs in error that it is necessary that the publication should have been made with the intention that it should reach the jurors so as to affect the case on trial, is likewise untenable as the slightest reading of the cases cited *supra* will show.

So in this case we have the publication of an article in a newspaper managed by one of the contemnors and owned by the other, that of its very nature was such that when read by any or all of the jurors then impaneled to try the case on trial would in itself tend to create bias or prejudice against the defendant. This bias or prejudice would most naturally be derived by reason of the fact that the article set forth a criminal record of the defendant Poe that in no proper way could have been brought to the attention of the jury unless Poe himself had cast his good reputation into the balance. Had the article appeared in the newspaper prior to the impaneling of the jury, it would not have been as detrimental to him as it was in the present case for the reason that Poe's attorney could have questioned the jury on its *voir dire* as to whether or not any of them had read the article and from it formed or expressed an opinion. If such an examination on the *voir dire* had disclosed any or all of the jury men to be in possession of an opinion, formed

from the article, challenge for cause would have been sustained. The defendant Poe would have been further protected from the fact that he could have exercised some or all of his peremptory challenges to rid himself of persons on the jury whom he might have cared to peremptorily challenged. But the article appearing after the case had started and the defendant thus rendered powerless to protect his interests by an examination of the jury men and exercise of the challenges above indicated, the article itself interfered with the due administration of justice so near to the presence of the court as to obstruct it. The newspaper was shown to have been published and circulated in the city where the trial was then being had and was read by some of the jury men, and it can hardly be said that courts need submit to the publication of such articles in newspapers published and circulated as the one in this case was and be powerless to punish the persons responsible therefor, unless the newspaper should have been deliberately given to members of the jury with the intention to influence them or sold in the court room itself.

The cases we have heretofore cited clearly point out the meaning of the words in the statute and we submit that the reasoning therein contained is applicable to this case, and the judgment appealed from by plaintiffs in error should be affirmed.

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## WAS THE COURT JUSTIFIED IN IMPOS- ING THE FINE IT DID?

We agree with counsel for plaintiffs in error when they state this is a criminal contempt.

(Brief of Plaintiffs in Error page 38).

As to the matter of the lower court's taking into consideration the costs of the case against Poe, we submit that this being a criminal contempt the court had a right to impose such punishment, either by way of fine or imprisonment, as in its discretion it saw fit. The statute expressly gives this power to Federal Courts.

### Section 268 Judicial Code of U. S.

The lower court in imposing the fine merely stated in its opinion that in justice the punishment should be at least the amount of damage suffered by the United States because of the continuance of the Poe case.

Transcript page 22.

This was done because in his discretion the Judge felt that it would be a safe guide to him in arriving at a sum which he felt would adequately punish the contemnors not as a compensatory amount but as a punishment for the violation of the court's privilege to have all matters pending before it proceed to a conclusion without the extraneous influence that might flow from such articles in newspapers as the

one in question.

The adjudging of Mr. Campbell in contempt was warranted under the law and has found sanction heretofore.

See:

U. S. vs. Toledo Newspaper Co., 220 Fed.  
458.

In conclusion we respectfully submit that the judgment appealed from should be affirmed.

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